No. 49601-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MIGUEL TRUJEQUE-MAGANA, and

LUCIANO MOLINA-RIOS.

Appellants.

REPLY BRIEF OF APPELLANT TRUJEQUE

On Appeal From Clark County Superior Court
The Hon. Robert Lewis, Presiding

NEIL M. FOX
Attorney for Appellant
WSBA No. 15277
2125 Western Ave. Suite 330
Seattle WA 98121

Phone: (206) 728-5440
Email: nf@neilfoxlaw.com

TABLE OF CONTENTS

TABLE OF CASES

Page

Washington Cases

Federal Cases

Statutes, Constitutional Provisions, Rules and Other Authority

A. ARGUMENT IN REPLY

1. *There Was Not a Reasonable Suspicion to Support Mr. Trujeque's Detention*

The State cites to *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015), in support of its argument that the police were justified to pull over and detain Mr. Trujeque Magana. *Brief of Respondent* ("*BOR*") at 16-20. Actually, an analysis of *Fuentes* and a more recent case, *State v. Weyand*, 188 Wn.2d 804, 399 P.3d 530 (2017), supports Mr. Trujeque's position, not the State's.

Fuentes involved two consolidated cases, *State v. Fuentes* and *State v. Sandoz*, with different facts and different outcomes. In *Fuentes*, a narrow five-justice majority of the Court upheld the warrantless detention of Ms. Fuentes, but reversed based upon the illegal detention of Mr. Sandoz.

In *Fuentes*, the police went to an apartment to look for an individual (Mr. Fenton) suspected of making controlled sales to an informant. The police had relatively recently found drugs in the same apartment pursuant to a warrant. The police surveilled the apartment and saw a steady stream of foot traffic whereby individuals would enter the apartment, stay for a few minutes and leave. Around midnight, the officers saw Ms. Fuentes arrive, go into the apartment. leave and go back to her car, and then take a plastic bag with

something inside that was the size of a small football back into the apartment. She left again a few minutes later with the bag containing noticeably less content than when she entered. *Fuentes*, 183 Wn.2d at 156-57.

The majority upheld the warrantless detention of Ms. Fuentes, not just because of her proximity to Mr. Fenton's apartment, but because she was one of the steady stream of people going in and out of the apartment for short periods of time, and she was seen carrying an object in and leaving without it:

> From these observations, officers could form a reasonable suspicion that Fuentes made a delivery at the apartment. Given the context of her short-stay visit to an apartment with known drug use — after officers observed short-stay traffic consistent with drug transactions — and her delivery, officers could reasonably suspect that Fuentes delivered drugs.

Fuentes, 183 Wn.2d at 162-63.

In contrast, the Court reversed Mr. Sandoz's conviction. In his case, the police were surveilling an apartment complex characterized by a high number of drug and other criminal activity, where several tenants had drug convictions. A police officer saw a Jeep parked illegally, and the driver (not Mr. Sandoz) slumped down as if to hide from the officer when the latter drove past. When the officer approached the vehicle, the driver told him he was picking up a friend. Then, the officer saw Mr. Sandoz leave the

apartment of someone known to have a prior drug dealing conviction and an apartment characterized by a lot of foot traffic (although not that evening). Sandoz walked with his head down and hands in his pocket; he got into the Jeep with "big" eyes; and when the officer asked him what he was doing, he began shaking and arguably gave statements that contradicted what the driver said (according to the officer). *Fuentes*, 183 Wn.2d at 153-54.

The Supreme Court held that reasonable suspicion did not exist. Mr. Sandoz was not seen doing anything illegal. The fact he was surprised to see the police was not incriminating; he was not the one who slumped down in the car when the officer passed by; and just visiting an apartment of a known drug dealer was not sufficient to justify a stop. *Fuentes*, 183 Wn.2d at 159-61.

More recently, in *Weyand*, the Court reversed a conviction where the police detained someone without a warrant where he (with another male) exited a house with a very extensive history of drug activity, including a search that had just taken place a few days beforehand. *Weyand*, 188 Wn.2d at 807-08. When Mr. Weyand and the other person left, they "walked quickly toward the car, they looked up and down the street. The driver looked around

once more before getting into the car. Weyand got into the passenger seat." *Id*. at 807.

Applying *Fuentes*, the Court made it clear that the mere fact that someone was seen exiting a residence with a history of drug activity was not sufficient for there to be reasonable suspicion. The Court also disputed the significance of the so-called "furtive" movements when Mr. Weyand was seen looking up and down the street, quoting recent criticisms of that term from U.S. District Court Judge Shira Scheindlin and Seventh Circuit Judge Richard Posner, criticisms that make it clear that such terminology is vague and unreliable, and often a justification for an arbitrary detention. *Weyand*, 188 Wn.2d at 815-816.

Analyzing all three cases -- *Fuentes*, *Sandoz*, and *Weyand* -- the determinative factors that led the Court to affirm Ms. Fuentes' conviction but reverse Mr. Sandoz's and Mr. Weyand's convictions are: (1) the apartment that Fuentes was observed going up and back to appeared actively to be involved in drug trafficking, at the very time she was there – in contrast, Mr. Sandoz and Mr. Weyand simply were seen at houses that had a past record of drug involvement, but there was no information that such activity was on-going at the time they were present; and (2) Ms. Fuentes was carrying

something that was consistent with drug dealing – the bag with the object inside that was gone after she left the apartment -- whereas neither Mr. Sandoz nor Mr. Weyand were personally doing anything other than just visiting the residence at issue.

Mr. Trujeque's case is more like Mr. Weyand's and Mr. Sandoz's than Ms. Fuentes'. He was seen merely hanging out with someone independently suspected of drug activity, but he was not observed even carrying objects in and out of a drug house, the way Ms. Fuentes was. And while Ms. Fuentes was part of a stream of people coming and going and staying at the drug house for just a few minutes, Mr. Trujeque's "crime" was the opposite – he was seen for hours doing nothing, which then was used against him. At most, Mr. Trujeque was seen making "furtive" gestures in the car – innocuous actions out of sight, which the police attributed to drug activity, a practice criticized by the Court in *Weyand*:

> Judge RICHARD POSNER has similarly recognized that "furtive movements," standing alone, are a vague and unreliable indicator of criminality, writing, "Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited." *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).

State v. Weyand, 188 Wn.2d at 816.

Like Mr. Sandoz and Mr. Weyand, Mr. Trujeque was not seen *doing anything* other than spending time with someone suspected of drug offenses. Trujeque's detention violated the Fourth Amendment and article I, section 7. The Court should reverse the convictions and suppress all evidence flowing from his illegal detention.

2. *There Is Insufficient Evidence That Mr. Trujeque Possessed Either the Heroin or Cocaine, or the Firearms in Ms. Santiago's Closet*

a. Molina's and Santiago's Apartment

With regard to the cocaine and firearms found in Ms. Santiago Santos' ("Santiago") closet, the State's argument that there is sufficient evidence to sustain the convictions in Counts 4, 6, 7 and 8 is based upon a supposed "concession" by Trujeque's trial counsel in argument that his client resided in the apartment, the fact that Trujeque traveled to the Seattle area with Ms. Santiago and Mr. Molina Rios ("Molina"), the fact that a shirt that was similar to one he was wearing in a Facebook posting was found in Santiago's closet, and a rental agreement. *BOR* at 28-29.[1]

[1] Additional facts recited in the State's brief at page 10 and 11 (i.e. Molina's and Santiago's custodial statements) were not admitted at trial.

The State cites to the rental agreement, Ex. 115,[2] but this agreement actually demonstrates why there is insufficient evidence. The document was found on Mr. Molina's nightstand next to his bed, along with Molina's birth certificate, information about Molina's bank account and some scrawled, handwritten "drug notes." RP 640-42. The rental agreement, entitled "Welcome to Evergreen Park Move In May 19, 2015" is dated May 19, 2015. It was signed on May 17, 2015, with signatures of the agent of the owner of the apartment, Miguel Trujeque, Sandy Gongora Chi ("Gongora"), and Luciano Molina. Although the document refers to a "lease term" of 11 months and 13 days (beginning on 5/19/15), the document itself is not a "lease" and actually was signed subject to approval by the owner.

The document does not prove actual occupancy of the apartment on November 5, 2015. In fact, there is no dispute in the record that Ms. Santiago resided in the apartment, but her name is not on Ex. 115. In contrast, while Ms. Gongora's name is on the document, there is no evidence she resided there. Thus, merely signing the document in May does not translate into actual residency months later.

---

[2] Ex. 115 was apparently withdrawn from the clerk's office and returned to law enforcement. Counsel is endeavoring to work out a stipulation so that this Court can have the documents in Ex. 115 for purposes of appellate review.

The fact that someone signed a rental agreement with others may give the person some ethereal ownership rights to the apartment space, but it does not necessarily mean the person had the right even to enter the apartment at a later time. Ownership is different than occupancy. For instance, in *State v. Schneider*, 36 Wn. App. 237, 673 P.2d 200 (1983), the Court of Appeals affirmed a conviction of the owner of a house for burglarizing the premises of her tenant:

> In this case, there is sufficient evidence from which a reasonable juror could infer that Schneider was not licensed, invited or privileged to enter the house in question. At the time of the burglary, the house was occupied by a tenant, who had lived there for some time before Mr. Schneider moved in with her. It is also clear that Mrs. Schneider never actually lived in the house during the time in question.

Id. at 241. Thus, the mere fact that Mr. Trujeque signed some sort of letter of intent to lease the apartment does not mean that he actually lived there months later, nor does it show that he had dominion and control over the items in non-common areas of the apartment – i.e. Ms. Santiago's closet.[3]

The State argues that "when a person has dominion and control

---

[3] *See State v. Morse*, 156 Wn.2d 1, 12, 123 P.3d 832 (2005) ("A person may have free access to some areas of the premises but not all areas. For example, the possessor of a home may share control and access to areas such as the kitchen, the dining room, the living room, and the bathroom but not other, private areas such as the possessor's bedroom, office, basement, or attic."); *State v. Rio*, 38 Wn.2d 446, 450-51, 230 P.2d 308 (1951) (tenant who lived in house was not allowed into non-common areas, and thus committed burglary when he killed owner in bedroom).

over premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises." *BOR* at 29. The State cites *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010), for this proposition. In *Reichert*, the defendant not only had the keys to the house at issue on his person, but a car registered to him was seen outside this residence, he was arrested inside the residence, and there were documents inside a safe that showed how he split payment of the utility bills with the house's other resident. *Id*. at 379-80, 390-91. Here, Mr. Molina had the key, not Mr. Trujeque. RP 636. There was no evidence offered at trial that Mr. Trujeque was ever inside the apartment, and there was no evidence offered that he actually paid the rent or the utilities.

To the extent that *Reichert*'s holding is that there is a "presumption" that a person who has dominion and control over premises has dominion and control over all items on the premises, this principle turns the presumption of innocence on its head. What it means is that any time a person has a roommate, he or she is charged legally with knowledge of everything in that person's room, and would have to come forward and prove his or her innocence if the police found contraband in the roommate's closet. Such a presumption violates due process of law and the right to remain silent under

the Fifth and Fourteenth Amendments and article I, sections 3 and 9.[4] Thus, the mere fact that Mr. Trujeque signed a rental agreement for the apartment in May 2015 is not sufficient to show that he had dominion and control over things found in Ms. Santiago's closet in November 2015.

Next, the fact that Mr. Trujeque's shirt apparently was in Ms. Santiago's closet is not dispositive. Of course, there is no doubt that Mr. Trujeque knew Ms. Santiago and Mr. Molina, but the fact that a shirt of his ended up in Santiago's closet cannot suffice to show he had dominion and control over the drugs and guns in the closet.[5] Every person who once left a personal item at another's home does not then have the right to go into the residence, and go through the closets. Yet, this is what the State's argument suggests – that if a person's shirt is in a friend's closet, the person would have the right to enter secretly and ransack the closet looking for valuables. This is not the case, and the State's argument lacks commonsense.

---

[4] *See State v. Savage*, 94 Wn.2d 569, 572-76, 618 P.2d 82 (1980); *Sandstrom v. Montana*, 442 U.S. 510, 523, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). *See also State v. Cantabrana*, 83 Wn. App. 204, 921 P.2d 572 (1996) (reversing conviction where court instructed jury that constructive possession where there "is dominion and control over the . . . the premises upon which the substance was found).

[5] *See State v. Callahan,* 77 Wn.2d 27, 31, 459 P.2d 400 (1969) (houseguest who had personal possession on houseboat was not in dominion and control of drugs found on the boat).

Finally, the State relies on Mr. Trujeque's attorney's concessions below. But the attorney actually was not always consistent in his concessions, sometimes referring to the fact that the State and witnesses merely alleged that his client resided in one room:

> So they get back to the apartment. This is an apartment with two bedrooms, and in these two bedrooms, one of them, they're going to attribute to Luciano Molina. The other one they're going to attribute to Juana Santiago-Santos and Miguel Trujeque.

RP 535-36.

> You got two separate rooms and evidence has proved to you that Miguel Trujeque lived in one. Juana Santiago lived in that same one and that Luciano Molina lived in the other one. I mean, that's what Detective Hall said. The State's, you know, designee said. Said she lives there.

RP 1199.

However, even if the attorney "conceded" in his argument that Mr. Trujeque resided in the apartment on November 5, 2015, this was not a formal stipulation before the jury.[6] It was argument of counsel only, and the jurors were clearly told that such argument was not to be considered as

---

[6] "A 'stipulation' is an express waiver that concedes, for purposes of trial, the truth of some alleged fact, with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it." *State v. Case*, 187 Wn.2d 85, 90, 384 P.3d 1140 (2016). There was never such an express waiver in this case that Mr. Trujeque either resided in the apartment or had dominion and control over the items in Ms. Santiago's closet.

evidence. CP 295 ("It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. . . . You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions."). It is presumed that the jurors followed this instruction. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

The Supreme Court has held that "an attorney's concession during closing argument does not waive any of the defendant's relevant constitutional rights. The State is still required to bear its burden, present admissible evidence, and convince a jury of every element of the crime beyond a reasonable doubt." *State v. Humphries*, 181 Wn.2d 708, 717 n.4, 336 P.3d 1121 (2014). Here, argument of counsel cannot substitute for proof.

There was insufficient evidence that Mr. Trujeque resided in the apartment, occupying Room # 7 with Ms. Santiago, on November 5, 2015. There was therefore insufficient evidence under the Fourteenth Amendment, article I, section 3 and the protective standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), to sustain convictions in Counts 4, 6, 7 and 8.

b. Ms. Santiago's Purse

The State argues that Mr. Trujeque was an accomplice to Ms. Santiago's possession of heroin in her purse or had constructive possession over the purse, using terminology that suggests that she was merely acting on behalf of Mr. Trujeque. *See BOR* at 28 ("Trujeque and Molina are the puppeteers and Santiago is the puppet."). Yet, there was absolutely no evidence at trial that Ms. Santiago lacked free will or that Mr. Trujeque (or her roommate, Mr. Molina) simply manipulated her for his own benefit, and it requires the adoption of sexist stereotypes simply to assume that Ms. Santiago could not possibly be in possession of her own drugs.[7] Ms. Santiago's purse was private and there is no evidence that Mr. Trujeque constructively possessed it.[8]

Moreover, it is also important to separate Mr. Trujeque from Mr. Molina, who undisputably was in possession of drugs and firearms at the apartment he shared with Ms. Santiago. The State's description of all of the

---

[7] The language about "puppets" is drawn from *Henderson v. United States*, ___ U.S. ___, 135 S.Ct. 1780, 1785, 191 L.Ed.2d 874 (2015), but the context was discussion of attempts by felons to control firearms held by others. Here, there was no evidence before the jury that Ms. Santiago was simply a "puppet" and that anyone was controlling her.

[8] *See State v. Wisdom*, 187 Wn. App. 652, 670, 349 P.3d 953 (2015) ("A person does not rummage through a [person's] purse because of secrets obtained therein.").

drugs and guns inside Molina's and Santiago's apartment, including the noscapine used to cut heroin, certainly shows *Santiago*'s involvement in drugs along with *Molina*. However, since there was no evidence that Mr. Trujeque actually resided in the apartment at the pertinent time, the State's argument here attempts to confuse the evidence of Mr. Molina's guilt with the lack of evidence of Mr. Trujeque's guilt.

There are many ways to try to prove someone's involvement as an accomplice in a drug case -- controlled buys; intercept applications to listen to phone calls and read texts; search warrants to review phones after the fact; informants; cooperating witnesses; or even forensic evidence such as fingerprints and DNA. Here, no such evidence was introduced at a trial. The only argument the State has is that Mr. Trujeque and Mr. Molina went to a restaurant and a mall, talked on their phones and did something in the car, while Ms. Santiago slept at times. This is not sufficient under the protective standard of *Jackson v. Virginia*, *supra*, the Fourteenth Amendment, article I, section 3, that Mr. Trujeque was Ms. Santiago's accomplice or that he had constructive possession over what was in her purse.

3. *Mr. Trujeque Was Not Armed With Firearms*

The State disputes reliance on *State v. Schelin*, 147 Wn.2d 562, 565, 55 P.3d 632 (2002), for the proposition that whether a person is armed is a mixed question of law and fact. *BOR* at 31 n.17. However, the Supreme Court's recitation of this standard is not an outlier, and is reflected in other cases.[9]

The State's analysis appears to concede that on November 5, 2015 – the date charged in the information (CP 114) and reflected in the jury instructions for Count 4 (CP 316, 341) -- Mr. Trujeque was not armed with a firearm since he was already under arrest. This is a wise concession because the focus of the firearm enhancement is on whether the weapon is easily accessible to the defendant, and obviously if Mr. Trujeque was not even in the apartment at the time of the offense, he did not have easy access to the firearms in Santiago's closet. *See State v. Johnson*, 94 Wn. App. at 892-97 (reversing enhancement where defendant was under arrest in handcuffs at the time he was near the firearm).

---

[9] *See State v. Johnson*, 94 Wn. App. 882, 892, 974 P.2d 855 (1999); *State v. Mills*, 80 Wn. App. 231, 234, 907 P.2d 316 (1995); *State v. Parker*, 190 Wn. App. 1037, 2015 Wash. App. LEXIS 2507, Slip Op. at 8 (2015) (unpub.) (cited as non-binding authority). In *Johnson*, the Court of Appeals rejected the argument the State makes here that somehow the "mixed question of law and fact" standard conflicts with a traditional sufficiency of evidence standard. 94 Wn. App. at 892 n.21.

The State makes two counter arguments. First, the State claims that Count 4 is charged as "on or about November 5" and thus Mr. Trujeque could have been "armed" with the firearms at times prior to his arrest (if there was any evidence he was ever in the apartment). The State then argues that the crime was a "continuing crime" and that Mr. Trujeque was "armed" with the firearms in the apartment over the period of time he supposedly possessed the cocaine with intent to deliver. *BOR* at 32-39.

The State, however, was the party that chose the charging dates for Count 1 and Count 4, and obviously assigned different dates to the different counts for the purpose of manipulating the sentence. Thus, when responding to the argument that Count 1 and Count 4 are the same criminal conduct, the State argues, "In addition, the drug crime charged in Count 1 (the heroin found in Santiago's purse) did not occur at the same time and place as the other drug counts (drugs at the apartment)." *BOR* at 66. The State's argument that Counts 1 and 4 are different because they occurred at a different time cannot then be squared with its own argument that Count 4 really did not take place on November 5th and stretched backwards into some unknown period of time.

While there may be cases where the State does charge a continuing offense,[10] such a continuing offense was not charged in this case, nor was there any evidence that there were drugs or guns in the house over a period of time. To be sure, in sex cases, courts have upheld, out of necessity, charges that are not specific to a particular time and place, allowing for "on or about" language and lengthy charging periods.[11] Still, there are constitutional limitations on such vague charging periods, given the right of an accused person to have notice of the precise charge.[12]

In this regard, this case is different than the ones relied on by the State because the timing of each count was significant. In the unpublished decision cited by the State, *State v. McCabe*, 174 Wn.App. 1080, 2013 Wash. App.

---

[10] *See State v. Simonson*, 91 Wn. App. 874, 880-83, 960 P.2d 955 (1998) (case involving manufacture of methamphetamine while armed over a specified six-week period of time). Other manufacturing cases cited by the State, such as *State v. Neff*, 163 Wn.2d 453, 181 P.3d 819 (2008) and *State v. O'Neal*, 159 Wn.2d 500, 150 P.3d 1121 (2007), do not contain details as to the charging periods and thus are of limited relevance.

[11] *See State v. Hayes*, 81 Wn.App. 425, 432-33, 914 P.2d 788 (1996) ("[W]here time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi."); *State v. Cozza*, 71 Wn. App. 252, 858 P.2d 270 (1993) (upholding three-year charging period). In this case, Mr. Trujeque had an alibi – he was under arrest and not in the apartment on November 5, 2015.

[12] U.S. Const. amends. VI & XIV; Const. art. I, §§ 3 & 22; *State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982). *See also State v. Rhinehart*, 92 Wn.2d 923, 602 P.2d 1188 (1979) (reversing conviction where state charged possession of stolen vehicle with particular VIN number but only proved possession of parts of that vehicle).

LEXIS 1220 (2013) (unpub.), the court affirmed a conviction with "on or about" language even though the "to convict" instruction mentioned one date, when McCabe's car was searched, but his car was actually seized a few days earlier. Yet, there was only one VUCSA count and "the evidence shows Mr. McCabe and the methamphetamine were both present in the vehicle at the time of arrest." *Id*., Slip Op. at 7. This is much different than the situation here where the State charged two counts of VUCSA on separate dates, one with a firearm enhancement tied to November 5th, and the other, on November 4th, without such an enhancement. There was no evidence as to when Mr. Trujeque was supposedly "armed" and no evidence that Trujeque, the drugs and guns were ever in the same place at the same time at any time prior to November 5th. *McCabe* is not even persuasive authority.

The State mentions, but does not distinguish, this Court's holding in *State v. Mills*, *supra*, even noting that *Mills* has been cited with approval by the Supreme Court. *BOR* at 29 n.16, 38 n.2.[13] In *Mills*, this Court reversed a firearm enhancement where the defendant was several miles away from a firearm at the time of his arrest. The Court rejected the State's argument that the language "on or about"language saved the enhancement because no

[13] *See, e.g., State v. Gurske*, 155 Wn.2d 134, 141, 118 P.3d 333 (2005) (citing *Mills* as "instructive").

evidence showed the defendant, the methamphetamine, and the handgun were ever present in the motel room at the same time. *Mills*, 80 Wn. App. at 234-36. Similarly, here, there was no evidence that Mr. Trujeque was ever in apartment at the same time as the drugs and the guns together, and thus "on or about" cannot cure the deficiency in proof.

Accordingly, there was insufficient evidence to sustain the firearm findings under *Jackson v. Virginia*, *supra*, the Fourteenth Amendment and article I, section 3.

4. *The Brady[14] Claim is Ripe for Review*

The State argues that Mr. Trujeque's claim under *Brady* is best raised in a PRP because "the existence of the bag is not settled and facts outside the trial record are necessary to resolve this claim." *BOR* at 41. This is incorrect. Defense counsel stated that he had "learned that the shopping bag that Mr. Trujeque was carrying as he left the mall was in the trunk of the white Honda and should still be there." CP 276. Moreover, even the police detective acknowledged he had a memory of the bag: "It should be noted that I had no recollection of any bag in Ms. GONGORA's vehicle, or the possible existence of such an item until Mr. ENGLE made the request for me to search

[14] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

her vehicle during the court recess on 6/28/2016." CP 349. Det. Hall did not say he had no memory at all -- only that he had not had a memory "until" the request was made. The record is complete and a PRP is not necessary.

Next, the State argues that Mr. Trujeque had access to the information himself so there was no *Brady* violation. *BOR* at 41-42 (citing *State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158 (2011)). Whether *Mullen* really stands for this proposition or not is irrelevant.[15] Here, Mr. Trujeque's lawyer found out about the shopping bag and wanted the State and its police agents to produce it for court, which they refused to do. There is no issue about the defense failing to follow up on leads for information.

As for prejudice, the State argues that, even if there was evidence that Mr. Trujeque shopped at the mall, this evidence would not have changed the result of the trial or the suppression ruling. *BOR* at 42-43. But given the State's theory that Mr. Trujeque must have been involved in some sort of drug deal near Seattle because everything he did was supposedly consistent

---

[15] The issue in *Mullen* was information in the possession of third-party civilian witnesses, and the Court made it clear its ruling did not extend to information in the hands of the police. *State v. Mullen*, 171 Wn.2d at 894 ("The government must disclose not only the evidence possessed by prosecutors but also evidence possessed by law enforcement as well."). Moreover, in *State v. Davila*, 184 Wn.2d 55, 71-73 & n. 4, 357 P.3d 636 (2015), the Supreme Court rejected construction of earlier decisions like *Mullen* that would lead to the conclusion that if the defendant could have found out about exculpatory or impeachment evidence on its own, there would be no *Brady* violation.

with what drug dealers do, evidence that he actually shopped would have been powerful rebuttal evidence to the conclusion testimony of the State's police witnesses. The issue, not discussed by the State, is whether the suppressed information (the shopping bag in the trunk) would have undermined confidence in the verdict by putting the case in a different light. *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Evidence that Mr. Trujeque went shopping at the mall meets this standard, and the Court should reverse because of the violation of due process under the Fourteenth Amendment and article I, section 3.

5. *The Informant Should Have Been Disclosed*

The State's argument regarding disclosure of the informant simply adopts the trial court's analysis: "[i]f I go up to the counter in a store, and there's only one person at the counter, does that mean that's the only person who works at the store because every time I go to the store there's only one person at the counter?" *BOR* at 47 (quoting RP 48-49). This analogy is not an apt one. If every time someone goes to a small store and there is only one person at the counter, the fact that there is only one person at the counter is evidence that in fact one person works in the store. It does not rule out the possibility that others are hidden in the back, but it certainly

is evidence subject to further inquiry that only one person worked there. The trial court's ruling to the contrary cut off the possibility of the defense offering evidence of only one person in the store (i.e. Molina). This was error under the Sixth and Fourteenth Amendments and article I, sections 3 and 22.

6. *The Opinion Evidence Was Improper*

The State appears to concede that it is improper for police officers to make personal opinions as to the guilt of the defendant, but argues its witnesses did not cross the line. *BOR* at 51. Yet, the police witnesses here did exactly what the State agrees they should not do. They did not give information about drug dealers in general, but offered specific opinions about these two defendants.[16] Courts have critiqued the practice of allowing a police officer to be both an expert witness and percipient witness in the same case.[17]

---

[16] *See, e.g.,* RP 585-86 (when asked what he thought Molina and Trujeque were doing in the car, Deputy Ferguson said that they were preparing to conduct a drug deal or secreting themselves from the police -- "I believe that they could have been counting money, because they were going back and forth together, or potentially packaging drugs in the car."); RP 966 (when asked what level of drug dealers the defendants were, Det. Hall stated, "They are at least middle, most likely upper-level drug dealers."). This is not generalized testimony about the habits of drug dealers generally, but specific statements of opinion as to the guilt of the defendant: "They are . . . drug dealers."

[17] *See, e.g., United States v. Reyes Vera*, 770 F.3d 1232, 1242 (9th Cir. 2014) ("an agent's status as an expert could lend him unmerited credibility when testifying as a percipient witness, crossexamination might be inhibited, jurors could be confused and the agent might be more likely to stray from reliable methodology and rely on hearsay.").

The State argues any error was harmless, but the State centers on the amount of drugs and testimony about hierarchy. *BOR* at 53. The issue, though, is the direct opinion that Mr. Trujeque was engaged in a drug deal when he was in the Seattle area and that, based upon what was in the apartment, he was a "drug dealer." Such conclusions cannot be harmless where the entire defense was built on a denial that Mr. Trujeque was anyone's accomplice and was not in possession of drugs or guns – that he was the innocent party (compared to Ms. Santiago and Mr. Molina). The Court should reverse the convictions due to the violation of due process and the right to a jury trial. U.S. Const. amends. VI & XIV; Const. art. I, §§ 3,21 & 22.

7. *RCW 9.41.171 is Unconstitutional*

The State recognizes the constitutional problems with a statute that gives special preferences to Canadians. The State argues that even if the statute is unconstitutional, it is not facially invalid and Mr. Trujeque, who the State claims had no status in the U.S., cannot complain. *BOR* at 53-61.

While there was a stipulation that Mr. Trujeque was not a citizen of the U.S. or Canada, was not a permanent U.S. resident, and did not have a lawful visa, RP 757, there was no evidence, as claimed by the State, that Mr.

Trujeque was not "legally present in the United States." *BOR* at 58. There may be ways to be lawfully present in the United State without having a green card or a visa.[18]

Thus, to the extent that RCW 9.41.175's gives special privileges to Canadians (the ability to possess a firearm in the U.S. without a passport or visa), the statute violates equal protection. U.S. Const. amend. XIV; Const. art. I, § 12. Moreover, contrary to the State's argument that there can be a facial challenge only in the First Amendment arena, *BOR* at 55, currently both the U.S. Supreme Court and our Supreme Court allow for facial challenges even outside the First Amendment arena.[19] Accordingly, Mr. Trujeque can mount a facial challenge to the statute, without regard to the facts of his case. The unconstitutional discrimination in favor of Canadians cannot be "severed" as the jury instructions in this case included that exception. CP 327. This count should be reversed.

---

[18] *See* Waiver Program for Tourists and Business Travelers (https://www.usa.gov/visas#item-213289 (explaining how citizens of 38 countries do not need visas for business or pleasure travel) (accessed 1/10/18).

[19] *See City of Chicago v. Morales*, 527 U.S. 41, 53-55, 119 S. Ct. 1849, 144 L.Ed.2d 67 (1999) (Stevens, J., opinion) (facial challenge to gang loitering ordinance); *City of Sumner v. Walsh*, 148 Wn.2d 490, 61 P.3d 1111 (2003) (facial challenge to juvenile curfew).

8. *All Counts Are the Same Criminal Conduct*

The State backtracks on its earlier argument that Count 4, 6, 7 and 8's charging period was before November 5, 2015, and that these offenses occurred at the same time as Count 1. Now, the State argues that Counts 1 and 4 took place at a different time and place from each other. *BOR* at 66. The State should not be allowed to argue both positions at the same time and manipulate the sentencing by the artificial division of the counts. The counts are all the same criminal conduct, all linked together in one way or another -- Counts 1 and 4 both involve different substances supposedly possessed with intent to deliver; Counts 4, 6, 7 and 8 all involve the same firearms.

B. CONCLUSION

For the foregoing reasons and those set out in the Opening Brief, the Court should reverse and remand for dismissal, a new trial or resentencing.[20]

DATED this 12th day of January 2018.

Respectfully submitted,

s/ Neil M. Fox
WSBA NO. 15277
Attorney for Appellant Trujeque

[20] Mr. Trujeque has not included replies on all subjects raised in the opening brief but that does not mean he concedes these issues or has abandoned those arguments.

CERTIFICATE OF SERVICE

I, Neil Fox, certify and declare as follows:

On January 12, 2018, I served a copy of this REPLY BRIEF OF APPELLANT TRUJEQUE on counsel for the Respondent and counsel for the Appellant Molina Rios and all other parties by filing a copy through the Portal and thus a copy will be delivered electronically.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of January 2018, at Seattle, Washington.

s/ Neil M. Fox
WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

January 12, 2018 - 11:00 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49601-1
Appellate Court Case Title:	State of Washington, Respondent v Miguel A. Trujeque-Magana and Luciano Rios, Appellants
Superior Court Case Number:	15-1-02180-0

The following documents have been uploaded:

- 496011_Briefs_20180112105109D2514143_7032.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was Trujeque Reply 011218 Final.pdf
- 496011_Designation_of_Clerks_Papers_20180112105109D2514143_0131.pdf
  This File Contains:
  Designation of Clerks Papers - Modifier: Supplemental
  The Original File Name was Supp designation 011218.pdf

A copy of the uploaded files will be sent to:

- Liseellnerlaw@comcast.net
- aaron.bartlett@clark.wa.gov
- cntypa.generaldelivery@clark.wa.gov
- skylarbrettlawoffice@gmail.com
- valerie.liseellner@gmail.com
- valerie.skylarbrett@gmail.com

Comments:

Sender Name: Neil Fox - Email: nf@neilfoxlaw.com
Address:
2125 WESTERN AVE STE 330
SEATTLE, WA, 98121
Phone: 206-728-5440

Note: The Filing Id is 20180112105109D2514143